

1 Over 15 years ago, the Seventh Circuit found AT&T liable on a similar essential
2 facilities claim for impeding a competitor's interconnection to its network, which was an
3 essential facility because "AT&T had complete control over the local distribution facilities that
4 MCI required." *MCI*, 708 F.2d at 1133. The court recognized that "local telephone service is
5 generally regarded as a natural monopoly" and found a refusal to permit access to the network
6 created a "bottleneck" problem. *Id.* at 1132, 1133. Regrettably, these observations are as true
7 today as they were in 1983. Pacific's conduct merely revisits past Section 2 violations.

8 **3. Section 2 -- Attempted Monopolization**

9 Pacific's efforts at monopoly leveraging would violate Section 2 even if Pacific had
10 not obtained or maintained a monopoly in the Local ISP and Local Telecommuter markets.
11 Leveraging is unlawful even when the monopolist has merely *attempted* to monopolize a second
12 market. *See, e.g., Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937,
13 952 (9th Cir. 1996) (monopoly leveraging theory stated a claim where defendant allegedly "used its
14 monopoly power in the gas delivery market in an attempt to monopolize the market for gas sales");
15 *Alaska Airlines*, 948 F.2d at 547 (leveraging applies where "defendant used its monopoly power in
16 one market to obtain, *or attempt to attain*, a monopoly in the downstream, or leveraged, market")
17 (emphasis added). Pacific's conduct more than supports a claim of attempted monopolization of the
18 Local ISP and Local Telecommuter markets.

19 An attempted monopolization claim, naturally, requires a lesser showing of market
20 power than a claim of actual monopolization. Covad need only show "(1) that the defendant has
21 engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a
22 dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506
23 U.S. 447, 456 (1993). Covad will prove each of these elements.

24 **a) Pacific has engaged in anticompetitive conduct**

25 First, Pacific's conduct, as described above, is plainly anticompetitive and predatory.
26 *See pp. 15-17, above.*

27

28

1 **b) Pacific had specific intent to monopolize**

2 Second, Pacific's intent to monopolize is clear both from its own pronouncements,
3 and by inference from its conduct. *See William Inglis & Sons Baking Co. v. ITT Continental*
4 *Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982) ("existence of
5 specific intent may be established not only by direct evidence of unlawful design, but by
6 circumstantial evidence . . . of illegal conduct"). Again, this is not news in the telecommunications
7 context -- the refusal to connect a competitor to an incumbent's network is recognized as sufficient
8 evidence of intent where, as here, the FCC authorized such interconnections. *See MCI*, 708 F.2d at
9 1149. In addition to the refusals and unjustified delays already described, Pacific also showed its
10 monopolistic intent when, among other things:

11 • Pacific acknowledged in testimony before the CPUC, shortly prior to
12 announcing its ADSL rollout, that Covad's DSL service placed "competitive pressures" on Pacific's
13 ISDN service offering. *In the Matter of the Application of Pacific Bell for Authority to Increase*
14 *and Restructure Certain Rates of Its Integrated Services Digital Network Services*, Application 95-
15 12-043 (Testimony of Don Roe at 3:21-4:2) (Cregan Decl., Ex. I).

16 • Pacific's corporate parent, SBC, informed a former Covad employee that it
17 had only entered the DSL market in response to competitive pressure from Covad. *See* p. 11,
18 above.

19 • Pacific and its corporate parent, SBC, conducted simultaneous market trials
20 of ADSL service in both Texas and California. But they only rolled out ADSL service in
21 California, where Covad stands ready to compete, and not in Texas, where Covad cannot yet offer
22 competition. *See* p. 11, above.

23 • Pacific discriminated against Covad in provisioning loops and transport. *See*
24 pp. 10-11, above.

25 • Pacific in April 1998 announced a new requirement that Covad must agree to
26 deploy only a certain type of DSL technology not chosen by (or even acceptable to) Covad. The
27 SBC-authored memo noted that "[t]here will be no exceptions." ADSL Network Interface
28 Specification at 6, ¶ 5.1 (Feb. 1998) (emphasis in original) (Rugo Decl., Ex. B); p. 9, above.

1 c) **Pacific has a dangerous probability of obtaining**
2 **a monopoly**

3 Finally, Pacific has at minimum shown a dangerous probability of monopolizing the
4 Local ISP and Local Telecommuter markets. It is well established that "the minimum showing of
5 market share required in an attempt case is a lower quantum than the minimum showing in an actual
6 monopolization case." *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir.), *cert.*
7 *denied*, 516 U.S. 987 (1995) (44% market share is sufficient as a matter of law to support a finding
8 of market power if entry barriers are high); *Kodak II*, 125 F.3d at 1207 (market share "near 50% . . .
9 would suffice to support a jury finding of market power" for purposes of attempt claim). Here,
10 there can be no dispute that Pacific controls far in excess of 50% of the Local ISP and Local
11 Telecommuter markets -- the overwhelming majority of consumers in those markets still rely on
12 Pacific's POTS and ISDN services. Pacific's practices threaten to keep those consumers reliant on
13 Pacific, by those historic means or Pacific's own ADSL service.

14 4. **Telecommunications Act of 1996**

15 Congress enacted the Telco Act in order "to foster rapid competition in the local
16 telephone service market and to end the monopoly market of local providers." *City of Austin*, 975
17 F. Supp. at 933-34. Pacific has failed to meet its Telco Act obligation in at least two respects. First,
18 Pacific has repeatedly denied collocation space (thus far, in 50 COs) in violation of the FCC's
19 requirement that it prove to the CPUC that no space exists before doing so. *Local Competition*
20 *Order*, ¶ 550. Second, Section 251 of the Telco Act compels Pacific to provide interconnection,
21 unbundled network elements, and collocation to Covad "on rates, terms, and conditions that are just,
22 reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2), (3), (6). The FCC has interpreted this
23 nondiscrimination requirement to require Pacific to treat Covad like Pacific treats itself: "the term
24 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an
25 incumbent LEC imposes on third parties as well as on itself." *Local Competition Order*, ¶ 218. For
26 example, the access to unbundled network elements that Pacific provides Covad "must be at least
27 equal-in-quality to that which [Pacific] provides to itself." *Id.*, ¶ 312. Covad is likely to prevail on
28 its Telco Act claims as well, because Pacific has not remotely treated Covad as it treats itself.

1 **5. Unfair Competition -- Business & Professions Code Section 17200**

2 Covad will also prevail on its unfair competition claim against Pacific. California's
3 unfair competition statute is a sweeping prohibition against "any unlawful, unfair or fraudulent
4 business act or practice." Cal. Bus. & Prof. Code § 17200. The statute "has been interpreted
5 broadly to bar all ongoing wrongful business activity . . . in whatever context it presents itself."
6 *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332 (1998). The statute is to be given an "expansive
7 construction." *Southwest Marine, Inc. v. Triple A Machine Shop*, 720 F. Supp. 805, 808 (N.D. Cal.
8 1989). Thus:

9 • An "unfair" business practice under Section 17200 includes any practice
10 "whose harm to the victim outweighs its benefits." *Day*, 63 Cal. App. 4th at 332 (citation omitted).

11 • The "unlawful" practices forbidden by the statute include "any practices
12 forbidden by law, be it civil or criminal, federal, state or municipal, statutory, regulatory, or court
13 made." *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994). Indeed, the underlying
14 law need not even provide for a private civil remedy to give rise to a cause of action under Section
15 17200. *Stop Youth Addiction, Inc. v. Lucky Stores*, 17 Cal. 4th 553, 562 (1998).

16 • "A plaintiff suing under Section 17200 does not have to prove he or she was
17 directly harmed by the defendant's business practices." *Saunders*, 27 Cal. App. 4th at 839. Indeed,
18 the statute essentially "imposes strict liability" and it is not even necessary to show that the
19 defendant intended to injure anyone. *State Farm Fire & Casualty Co. v. Superior Court*, 45 Cal.
20 App. 4th 1093, 1102 (1996).

21 With these principles in mind, Pacific's pattern of unreasonable denials of service,
22 discriminatory provisioning of service, and each of its violations of the Sherman Act, the Telco Act
23 and the FCC's regulations independently establish a violation of Section 17200. As a result, Covad
24 is entitled to injunctive relief as a matter of right, without any inquiry into injury or damages. *See*
25 Cal. Bus. & Prof. Code § 17203 ("Any person who engages, has engaged, or proposes to engage in
26 unfair competition may be enjoined in any court of competent jurisdiction").

1 **C. The Balance of Hardships Favors the Injunction**

2 **1. Covad will be irreparably harmed in the absence of an injunction**

3 Covad needs an injunction now, before it suffers further damage at the hands of
4 Pacific. The antitrust laws recognize the importance of enjoining anticompetitive conduct *before* it
5 drives competitors out of business. *See Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104,
6 111 (1986) (Section 16 of Clayton Act “requires a showing only of ‘threatened’ loss or damage”).
7 Thus, an antitrust plaintiff “does not have to wait to be ruined in his business before he has his
8 remedy.” *Id.* at 112 n.8. Here, Covad stands to be seriously injured without an injunction.

9 Pacific’s dominant market position means that Covad is entirely dependent upon
10 Pacific for CO access and loops, and in most geographic areas entirely dependent upon Pacific for
11 transport. Moreover, because the expense of building a ubiquitous local telephone network is
12 prohibitive, there is no prospect that Covad or anyone else will be able to do so in time to be of any
13 benefit to Covad. *See, e.g., City of Austin*, 975 F. Supp. at 934 (“Congress recognized that it would
14 be extremely difficult for potential competitors to enter the market if they had to finance and build
15 their own local telephone networks”); *see also Intergraph Corp. v. Intel Corp.*, 1998-1 Trade Cas.
16 (CCH) ¶ 72,126, p. 81,807 (N.D. Ala., April 10, 1998) (finding that plaintiff, if it was to compete,
17 had no alternative but defendant’s microprocessors due to inability of any competitor to develop a
18 competing product “sufficiently soon to be a viable alternative . . . in the immediate future”).

19 In the emerging, technology-driven arena where Covad competes, even seemingly
20 small delays in time to market can prove harmful. *See, e.g., City of Austin*, 975 F. Supp. at 942
21 (finding irreparable harm from “delayed entry into [local telephone] market” because monetary
22 damages would be speculative and inadequate remedy); *Intergraph*, 1998-1 Trade Cas. at p. 81,812
23 (finding that a conceded 30-90 day delay in plaintiff’s time to market “would prevent [plaintiff]
24 from maintaining a competitive presence in the high-end workstation market.”); *see also United*
25 *States v. AT&T*, 524 F. Supp. at 1356 (refusing to dismiss antitrust claim based on manipulation of
26 timing of new product deployment so as to discourage new entry by competitors).

27 Similarly, inability to deliver dependable DSL service due to Pacific’s delays,
28 discrimination and inadequate provisioning would severely hamper Covad’s ability to compete for

1 its demanding and sophisticated target customers -- ISPs and employers of telecommuters. *See*
2 *Intergraph*, 1998-1 Trade Cas. at p. 81,816 (finding interruption in supply would irreparably harm
3 plaintiff "in terms of loss of good will, harm to reputation, and other losses").

4 Pacific's imminent attempt to capitalize on its control of Covad's offerings makes
5 the situation all the more urgent. Pacific is promising to roll out, on a broad, statewide basis, its
6 own DSL service in July 1998 and to make it "available to more than 5 million business and
7 residential customers by end of summer." Cregan Decl., Ex. A. Covad will be irreparably harmed,
8 and will have no adequate remedy at law, if Pacific does so while also keeping Covad out of the
9 market.

10 **2. The proposed injunction will prevent harm to the public**

11 The proposed injunction will also greatly benefit the public. Prohibition of
12 Pacific's consistent pattern of inhibitory behavior will mean that, rather than being limited to
13 Pacific's DSL offerings, consumers will be able to choose among competing DSL providers.
14 Hastening competitors' entry into developing markets is plainly in the public interest. *See United*
15 *States v. AT&T*, 552 F. Supp. 131, 150 n.80 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983) ("restraints
16 may be imposed upon the defendant which are designed to allow the development of nascent
17 competition within the relevant market") (citing *Ford Motor Co. v. United States*, 405 U.S. 562,
18 575 (1972)); *City of Austin*, 975 F. Supp. at 942 (enjoining as against public interest ordinance that
19 would have delayed competitors' entry into local telephone market). It is not too late to foster
20 competition in the Local ISP and Local Telecommuter markets. But if Pacific rolls out its service
21 while holding back its competitors, competition may never be the same.

22 **3. The proposed injunction imposes no cognizable hardship on Pacific**

23 The central relief Covad seeks -- access to the market at the same time as Pacific -- is
24 fair, and will not cause Pacific meaningful harm. *See Intergraph*, 1998-1 Trade Cas. at p. 81,830
25 (ordering defendant to supply certain key competitive information to plaintiff "in such form and
26 content as supplied to and at the same time [defendant] supplies such Information to [plaintiff's]
27 similarly situated competitors"). Indeed, the remedy is if anything generous to Pacific, given that
28 Covad attempted to offer DSL long before Pacific did so. This remedy really requires no more than

1 that Pacific comply with its preexisting obligations under the law, which already prohibit
2 discrimination against Covad and Pacific's other competitors. If Pacific may be exposed to some
3 additional burdens in order to make up for the fact that it has not complied with those obligations in
4 the past, Pacific has no room to complain. That is what an antitrust injunction is all about. *See*
5 *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950) (antitrust injunction should "cure
6 the ill effects of the illegal conduct"). In any event, the requested relief is less an imposition on
7 Pacific than the terms that US West is voluntarily providing to all CLECs in its 14 state territory --
8 US West is not even requiring cages at all. If US West can do that, surely Pacific can comply with
9 its obligations as requested in the injunction.

10 **IV. CONCLUSION**

11 For all the foregoing reasons, the Court should grant Covad's application and
12 enter a preliminary injunction against Pacific.

13 DATED: June 12, 1998.

McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

14
15 By: _____

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13
14 COVAD COMMUNICATIONS
COMPANY, a California corporation,
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16 Plaintiff,
17 v.
18 PACIFIC BELL, a California corporation,
19 Defendant.
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No. C 98-1887 SI

**SUMMARY OF ARGUMENT IN
SUPPORT OF APPLICATION FOR
PRELIMINARY INJUNCTION**

Date: August 14, 1998

Time: 9:00 a.m.

Place: Courtroom 4

Honorable Susan Illston

1 **I. THE NATURE OF THE DISPUTE**

2 In its Application for Preliminary Injunction, Covad Communications Company
3 ("Covad") asks the Court to enjoin Pacific Bell ("Pacific") from engaging in two classic monopolist
4 maneuvers: leveraging and denying access to essential facilities. Despite decades of
5 telecommunications reform, the breakup of the Bell System, and the Telecommunications Act of
6 1996 (the "Telco Act"), Pacific is up to the usual local telephone monopolist tricks -- using its
7 control over the local telephone network to secure and maintain its existing monopoly over
8 downstream markets dependent on that network. Pacific is simultaneously limiting the availability
9 of its essential facilities to competitors such as Covad, while utilizing those same facilities to roll
10 out its own new services in competition with Covad. It will cripple competition by doing so.

11 The solution to the problem is simple. The Court can ensure competition, and
12 bring the greatest benefit to consumers, by ordering Pacific to do what the Telco Act requires: to
13 give Covad equal access to the necessary elements of Pacific's monopolized network wherever
14 Pacific gives itself that access -- at the same time. No more unsubstantiated and illegal refusals
15 of space in Pacific's facilities or delays in providing them.

16 This relief serves everyone. The injunction will protect Covad from further
17 anticompetitive delays and refusals by Pacific. Consumers will benefit because they will receive
18 instant choice -- both Pacific and Covad will be at their doorstep with new service offerings at
19 the same time.

20 **A. The Parties and Their Services**

21 Pacific is a monopolist -- it controls the physical facilities that form the ubiquitous
22 local telephone network. The most prominent network features are the over 17 million telephone
23 lines to residential and business users (often referred to as "local loops") in California, and over
24 600 central offices (called "COs") where the residential and business telephone lines in a given
25 geographic area come together, and where Pacific keeps key network equipment.

26 Covad is a start-up, Silicon Valley-based company dedicated to providing high-
27 speed Digital Subscriber Line ("DSL") telecommunications services in the San Francisco Bay
28 Area and Los Angeles, among other places. Covad competes with Pacific to offer

1 telecommunications services to Internet service providers and corporations with telecommuting
2 needs. In order to compete, Covad must have access to Pacific's local loops, transport facilities,
3 and to collocation space in Pacific's COs; indeed, the Telco Act guarantees that access. Pacific
4 has total control over each of those items in its service area. That gives Pacific the ability -- but
5 not the right -- to slow Covad down and limit its reach. And that is precisely what it has done for
6 the past several months -- enough time, apparently, to prepare its own DSL deployment. On
7 May 27, SBC, Pacific's parent company, announced that Pacific would roll out its "FasTrak"
8 DSL service from 87 central offices to reach over 5 million Californians by the end of this
9 Summer, starting in July, 1998.

10 **B. Pacific's Anticompetitive Conduct**

11 Pacific has delayed -- and in some areas entirely cut off -- Covad's access to the
12 Local ISP and Local Telecommuter markets in a variety of ways, including:

- 13 • Outright denying Covad collocation space (the physical room need to
14 interconnect Covad's equipment with Pacific's) in almost one-third of the COs in which Covad
15 requested space, despite FCC regulations requiring it to first prove space unavailable before
16 doing so. Without collocation, Covad cannot compete for customers served by a given CO.
- 17 • Unreasonably delaying and complicating the provision of collocation
18 space even in those instances where it agrees to make it available. This has substantially
19 increased Covad's costs and also dramatically delayed its time to market.
- 20 • Discriminatorily delaying and providing local loops and transport facilities
21 to Covad, and providing unusable local loops even when finally providing them. As with
22 collocation, Covad cannot compete at all with loops and transport.
- 23 • Unilaterally and unnecessarily changing technical specifications for
24 providing DSL service, and requiring competing carriers such as Covad to conform to them.

25 **II. COVAD IS ENTITLED TO INJUNCTIVE RELIEF**

26 Covad satisfies the requirements for injunctive relief: it is likely to prevail on the
27 merits of its claims against Pacific; and it will be irreparably harmed in the absence of an injunction.
28 *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1396 n.1 (9th Cir.), *cert.*

1 *dismissed*, 118 S. Ct. 27 (1997). "These formulations are not different tests but represent two points
2 on a sliding scale in which the degree of irreparable harm increases as the probability of success on
3 the merits decreases." *Id.* Covad satisfies this test from any angle.

4 **A. Covad Is Likely to Prevail on the Merits**

5 **1. Sherman Act Section 2**

6 *Monopoly Leveraging.* Pacific's attempt to use its control over the local network
7 to squeeze competitors out of markets that require access to that network is a classic telephone
8 monopolist ploy. But using one monopoly to secure or maintain another monopoly is also a
9 classic Sherman Act Section 2 violation. *See Image Technical Services v. Eastman Kodak Co.*,
10 125 F.3d 1195, 1208 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998) ("*Kodak II*"). It has
11 specifically been found to violate the law in the telecommunications context. *MCI v. AT&T*, 708
12 F.2d at 1081, 1150-52 (7th Cir. 1983); *United States v. AT&T*, 524 F. Supp. 1336, 1344 (D.D.C.
13 1981).

14 Pacific's monopoly over the local telephone network is beyond question, essentially
15 a matter of public record. Indeed, that was the major reason for passage of the Telco Act. Pacific's
16 monopoly over the downstream Local ISP and Local Telecommuter markets, while less secure, is
17 equally obvious. Consumers still rely on Pacific's telephone network to connect their computers to
18 the Internet and their employers' computer networks. Enormous barriers to entry preclude anyone,
19 as a practical matter, from reaching these consumers without access to Pacific's network.

20 Pacific is leveraging its control over the local network to keep control of the Local
21 ISP and Local Telecommuter markets. Its anticompetitive conduct described above has succeeded
22 in delaying (and increasing the cost of) Covad's entry into most COs in Pacific's territory, and has
23 completely blocked Covad's access in many others. As the culmination of its leveraging plan,
24 Pacific recently announced its plan to quickly roll out to "over 5 million" Californians by "the end
25 of Summer" its own DSL technology -- including in areas where it continues to deny Covad
26 collocation space.

27 *Essential Facilities.* In a classic violation of the essential facilities doctrine, Pacific
28 barricades the door to the local telephone network. It is a violation of Section 2 when "one firm,

1 which controls an essential facility, denies a second firm reasonable access to a product or service
2 that the second firm must obtain to compete with the first.” *Kodak II*, 125 F.3d at 1210; *see also*
3 *MCI*, 708 F.2d at 1132-33 (quoting *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542
4 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992)). Pacific is liable because it has indisputably
5 hindered and denied access to its network, even though it was demonstrably practical to provide
6 efficient, nondiscriminatory access -- even other ILECs are doing it.

7 *Attempted Monopolization.* Finally, even if Pacific did not have a current monopoly
8 share in the Local ISP and Local Telecommuter markets, Pacific’s misuse of its control over the
9 local telephone network would make it liable for attempted monopolization of those markets. *Cost*
10 *Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 952 (9th Cir. 1996);
11 *Alaska Airlines*, 948 F.2d at 547. Pacific’s anticompetitive conduct provides ample evidence of its
12 intent to monopolize, *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d
13 1014, 1027 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982), and its high shares of the Local ISP
14 and Local Telecommuter markets, even if not sufficient to establish a monopoly, suffice to show a
15 dangerous probability of monopolizing them. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421,
16 1438 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995).

17 2. Telecommunications Act of 1996

18 Pacific’s failure to provide meaningful, nondiscriminatory access to its network is
19 also a violation of Section 251 of the Telco Act, which compels Pacific to provide such access on a
20 reasonable, nondiscriminatory basis. In addition, Pacific’s many outright refusals of collocation
21 space violate the FCC’s regulations implementing the Telco Act, because Pacific never attempted to
22 prove the unavailability of space before denying it. *Local Competition Order*, ¶ 550.

23 3. Unfair Competition

24 Covad will also prevail on its unfair competition claim under California Business &
25 Professions Code Section 17200. This statute by itself entitles Covad to injunctive relief against
26 Pacific for “any unlawful, unfair or fraudulent business act or practice.” Pacific’s pattern of
27 unreasonable denials of service, discriminatory provisioning of service, and violations of the Telco
28 Act all establish a violation of Section 17200.

1 **B. Covad and Consumers Will Be Irreparably Harmed**

2 Pacific's plan to make its DSL service available to over 5 million customers, while it
3 simultaneously prevents Covad from providing competing DSL service to many of those customers,
4 obviously hurts both Covad and consumers.

5 In emerging, technology-driven arenas such as telecommunications, even seemingly
6 small delays in time to market can prove harmful. *See, AT&T Communications of the Southwest v.*
7 *City of Austin*, 975 F. Supp. 928, 942 (W.D. Texas 1997) (finding irreparable harm from "delayed
8 entry into [local telephone] market" because monetary damages would be speculative and
9 inadequate remedy); *Intergraph Corp. v. Intel Corp.*, 1998-1 Trade Cas. (CCH) ¶ 72,126 at 81,812
10 (N.D. Ala. April 10, 1998) (finding that a conceded 30-90 day delay in plaintiff's time to market
11 "would prevent [plaintiff] from maintaining a competitive presence in the high-end workstation
12 market."); *United States v. AT&T*, 552 F. Supp. 131, 150 n.80 (D.D.C. 1982), *aff'd*, 460 U.S. 1001
13 (1983) ("restraints may be imposed upon the defendant which are designed to allow the
14 development of nascent competition within the relevant market"). It is not too late to foster
15 competition in the Local ISP and Local Telecommuter markets. But if Pacific rolls out its service
16 while holding back its competitors, competition may never be the same.

17 Pacific has no legitimate complaint about the relief Covad seeks -- had Pacific
18 complied with its obligations in the past, Covad would already enjoy the network access (and,
19 therefore, consumer access) it now seeks. That is what an antitrust injunction is all about. *See*
20 *United States v. United States Gypsum Co.*, 340 U.S. 76, 88 (1950) (antitrust injunction should
21 "cure the ill effects of the illegal conduct"). In any event, the relief Covad seeks can hardly be
22 said to impose any harm on Pacific -- US West, one of Pacific's fellow local telephone
23 monopolists is already providing similarly open access to its network, voluntarily. What it is
24 practical and competitively reasonable for US West to do, Pacific can surely do.

25 DATED: June 12, 1998.

McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

26 By: _____
27

Alfred C. Pfeiffer, Jr.

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13
14 COVAD COMMUNICATIONS
COMPANY, a California corporation,
15
16 Plaintiff,
17 v.
18 PACIFIC BELL, a California corporation,
19 Defendant.
20

No. C 98-1887 SI

**[PROPOSED] ORDER GRANTING
PRELIMINARY INJUNCTION**

Date: August 14, 1998
Time: 9:00 a.m.
Place: Courtroom 4
Honorable Susan Illston

On _____, 1998, this Court heard argument on the application for a preliminary judgment filed by Covad Communications Company (“Covad”) against Pacific Bell (“Pacific”). The Court has carefully considered the arguments of counsel and the papers submitted, this Court hereby GRANTS Covad’s application.

BACKGROUND

The Telecommunications Act of 1996 (the “Telco Act”), 47 U.S.C. §§ 251 *et seq.*, seeks to promote competition in the nation’s telecommunications system by opening up traditionally monopolistic local exchange networks to new competitors. Prior to the Act’s passage, local telephone services were provided by local exchange carriers (“LECs”) who were usually issued exclusive geographic franchises by state licensing authorities. Order Granting Plaintiff’s Motion for Summary Judgment and Denying Defendants’ Motions for Summary Judgment, *AT&T Communications of California, Inc. v. Pacific Bell*, No. C 97-0080 SI (May 11, 1998) at 1-2.

To facilitate the introduction of new competing local exchange carriers (“CLECs”), the Telco Act requires incumbent LECs to provide competitors with access to the LECs’ services and networks in three separate ways, two of which are at issue here:

(1) interconnection -- LECs must allow CLECs to interconnect with LECs’ local networks at fair, nondiscriminatory rates; and (2) lease of unbundled network elements -- LECs must allow CLECs to lease parts of the LECs’ networks at fair, nondiscriminatory rate. *Id.* at 2; 47 U.S.C. § 251.

Covad sought to enter into markets for the sale of high-speed, dedicated line service to Internet Service Providers (“ISPs”) and to companies wishing to connect their central computer networks to employees’ residence computers (“telecommuters”). Covad alleged that Pacific acted so as to hinder competition for the sale of those telephone services, and filed suit claiming violations of Sections 1 and 2 of the Sherman Act, the Telco Act, the Cartwright Antitrust Act, and California’s Unfair Competition Act. Covad applied for a preliminary injunction on June 12, 1998.

1 DISCUSSION

2 I. STANDARDS FOR INJUNCTIVE RELIEF

3 To obtain a preliminary injunction, Covad need only show either “(1) a
4 combination of probable success on the merits and the possibility of irreparable injury, or (2) that
5 serious questions are raised and the balance of hardships tips sharply in its favor.” *Dr. Seuss*
6 *Enterprises v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1396 n.1 (9th Cir.), *cert. dismissed*, 118
7 S. Ct. 27 (1997). “These formulations are not different tests but represent two points on a sliding
8 scale in which the degree of irreparable harm increases as the probability of success on the merits
9 decreases.” *Id.* (quoting *Big Country Foods, Inc. v. Board of Educ.*, 868 F.2d 1085, 1088 (9th
10 Cir. 1989)). The Court finds both that Covad is likely to succeed on the merits of its claims, and
11 that it is threatened with irreparable injury in the absence of an injunction.

12 A. Covad Is Likely to Succeed on the Merits

13 In its application for injunctive relief, Covad has presented three statutory claims,
14 violation of Section 2 of the Sherman Act, violation of Section 251 of the Telco Act, and
15 violation of Section 17200 of the California Business & Professions Code. While a likelihood of
16 success on any one of these claims would be sufficient, the Court finds that Covad is likely to
17 prevail on the merits of each claim.

18 1. Covad is likely to prove a Section 2 violation

19 Covad presents three separate theories for holding Pacific liable under Section 2
20 of the Sherman Act: (1) monopoly leveraging; (2) denial of an essential facility; and (3)
21 attempted monopolization.

22 A monopolization claim requires Covad to prove “(1) the possession of monopoly
23 power in the relevant market and (2) the willful acquisition or maintenance of that power as
24 distinguished from growth or development as a consequence of a superior product, business
25 acumen, or historical accident.” *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451,
26 481 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

27 This matter involves two relevant product markets: the provision of data
28 transmission services to (1) Internet Service Providers and their customers (the “Local ISP
[PROPOSED] ORDER GRANTING PRELIMINARY INJUNCTION (Case No. 98-1887 SI)

1 market”), and (2) medium-sized and large businesses who want to give their telecommuters and
2 after-hours workers access to the corporate network from home (the “Local Telecommuter
3 market”). Pacific currently supplies the vast majority of services in both these markets; most
4 customers still rely on regular telephone lines (referred to in the industry as Plain Old Telephone
5 Service, or “POTS”) for their Internet and telecommuter connections. The geographic market for
6 Telecommuter and ISP services is highly circumscribed. To provide service, Covad must have
7 access to every CO that serves the neighborhoods where its end users reside; thus, each CO is its
8 own geographic market.

9 *Monopoly Leveraging.* Monopoly-to-monopoly leveraging -- in which a
10 monopolist in one market uses that power to maintain or obtain a monopoly in another,
11 downstream market -- is one recognized type of Section 2 violation. *See Image Technical*
12 *Services v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997), *cert. denied*, 118 S. Ct.
13 1560 (1998) (“*Kodak II*”); *see also MCI v. AT&T*, 708 F.2d 1081, 1150-52 (7th Cir. 1983);
14 *United States v. AT&T*, 524 F. Supp. 1336, 1344 (D.D.C. 1981).

15 Covad is likely to prevail on its leveraging claim. Pacific has a clear monopoly in
16 the upstream market. Pacific has virtually 100% control over the physical facilities that comprise
17 the local telephone network in its service areas, which cover the vast majority of California.
18 While no set percentage of market share is required for a finding of monopoly power, Pacific’s
19 extremely high market share of the local network facilities indicates market power. *See United*
20 *States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 379, 391 (1956) (75% market share
21 constitutes monopoly power); *Grinnell*, 384 U.S. at 571 (80% market share is a “substantial
22 monopoly” and 87% “leaves no doubt . . . that defendants have monopoly power”); *see also*
23 *Kodak II*, 125 F.3d at 1206 (“Courts generally require a 65% market share to establish a prima
24 facie case of market power”).

25 Pacific also holds monopoly power in the downstream markets identified by
26 Covad, the Local ISP and Local Telecommuter markets. The overwhelming majority of Internet
27 users and telecommuters utilize Pacific’s services to make their connections to the Internet or
28 their employers’ computer networks -- most via POTS.

1 The Court finds that Covad is likely to succeed in showing that Pacific's conduct
2 was an attempt to use its control over the local telephone network to protect and maintain its
3 monopoly over the downstream Local ISP and Local Telecommuter markets. Pacific has
4 systematically erected barriers designed to keep competitors such as Covad from entering those
5 markets or, at a minimum, to delay their time to entry. This conduct includes refusals of
6 collocation space in Central Offices ("COs"), delayed and improper delivery of collocation
7 space, delayed and improper delivery of local loops and transport, and unilateral changes in
8 previously accepted technical practices. Together, these practices have prevented Covad from
9 entering some geographic markets altogether. In others, they have greatly increased Covad's
10 costs of operation and delayed its time to entry.

11 *Essential Facilities.* Covad is also likely to succeed on its essential facilities
12 claim. It is a violation of Section 2 when "one firm, which controls an essential facility, denies a
13 second firm reasonable access to a product or service that the second firm must obtain to
14 compete with the first." *Kodak II*, 125 F.3d at 1210; *see also MCI*, 708 F.2d at 1132-33 (quoting
15 *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991), *cert. denied*, 503
16 U.S. 977 (1992)). There are four elements to an essential facility claim: "(1) control of the
17 essential facility by a monopolist; (2) a competitor's inability practically or reasonably to
18 duplicate the essential facility; (3) the denial of the use of the facility to a competitor and (4) the
19 feasibility of providing the facility." *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d
20 1373, 1380 (9th Cir. 1992).

21 Covad is likely to succeed in showing each of those elements: (1) The local
22 telephone network is a recognized essential facility, *MCI*, 708 F.2d at 1132-33; indeed, that is
23 why Congress ordered Pacific to open up its network to competitors, in the Telco Act. 47 U.S.C.
24 § 251. (2) Congress also recognized that it would not be possible for competitors to quickly
25 duplicate the ubiquitous physical network. (3) Pacific's conduct as described above
26 unreasonably hindered access to its network. (4) It was plainly possible for Pacific to give
27 reasonable access to its network -- first, the Telco Act imposed the obligation to do so, and,
28 second, at least one other local telephone monopolist, US West, is already doing so.

1 *Attempted Monopolization.* Covad is also likely to prevail on its attempted
2 monopolization claim. To do so, Covad must show “(1) that the defendant has engaged in
3 predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous
4 probability of achieving monopoly power.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447,
5 456 (1993). Monopoly leveraging is a recognized form of attempted monopolization. *See Cost*
6 *Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 952 (9th Cir. 1996)
7 (monopoly leveraging theory stated a claim where defendant allegedly “used its monopoly power
8 in the gas delivery market in an attempt to monopolize the market for gas sales”); *Alaska*
9 *Airlines*, 948 F.2d at 547 (leveraging applies where “defendant used its monopoly power in one
10 market to obtain, *or attempt to attain*, a monopoly in the downstream, or leveraged, market”)
11 (emphasis added).

12 Covad will likely prove each of the elements of its attempted monopolization
13 claim. First, Pacific’s conduct as described above satisfies the requirement of predatory or
14 anticompetitive conduct. Second, Pacific has acted with specific intent to monopolize.
15 Existence of such intent may be inferred from Pacific’s illegal conduct. *See William Inglis &*
16 *Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981), *cert.*
17 *denied*, 459 U.S. 825 (1982). In particular, the refusal to provide interconnection to the local
18 telephone network has been recognized as evidence of monopolistic intent. *See MCI*, 708 F.2d at
19 1149. In addition to Pacific’s conduct preventing Covad from obtaining full and timely access to
20 Pacific’s network, Pacific has also indicated its intent by means of its conscious awareness of the
21 competitive threat Covad poses, its discriminatory treatment of Covad, and its unilateral attempt
22 to impose technological changes on Covad. Finally, Pacific’s high share of the Local ISP and
23 Local Telecommuter markets demonstrates that it has a dangerous probability of monopolizing
24 those markets. It is well established that “the minimum showing of market share required in an
25 attempt case is a lower quantum than the minimum showing in an actual monopolization case.”
26 *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir.), *cert. denied*, 516 U.S. 987
27 (1995) (44% market share is sufficient as a matter of law to support a finding of market power if
28

1 entry barriers are high); *Kodak II*, 125 F.3d at 1207 (market share “near 50% . . . would suffice to
2 support a jury finding of market power” for purposes of attempt claim).

3 **2. Covad is likely to prove a Telco Act violation**

4 Covad is also likely to succeed on its Telco Act claim. There are two separate
5 aspects to this claim. First, Pacific’s many denials of collocation space violated the FCC’s
6 implementing regulations, which required Pacific to prove to the California Public Utilities
7 Commission that space was unavailable before denying space. *In the Matter of Implementation*
8 *of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499,
9 C.C. Docket No. 96-98, FCC 96-325, ¶ 550 (Aug. 8, 1996). Pacific denied space in at least 50
10 COs without any attempt to make such a showing. Moreover, Pacific’s subsequent resurvey
11 results indicate that at least some of these initial denials were improper. Second, Pacific’s
12 conduct in providing untimely and unserviceable collocation, loops and transport appears to
13 violate Section 251 of the Telco Act, which requires Pacific to provide collocation and
14 unbundled loops and transport to Covad on fair and nondiscriminatory terms.

15 **3. Covad is likely to prove a Section 17200 violation**

16 Covad is also likely to prevail on its unfair competition claim against Pacific.
17 Section 17200 of California’s Business & Professions Code prohibits “any unlawful, unfair or
18 fraudulent business act or practice.” The statute “has been interpreted broadly to bar all ongoing
19 wrongful business activity . . . in whatever context it presents itself.” *Day v. AT&T Corp.*, 63 Cal.
20 App. 4th 325, 332 (1998); *see also Southwest Marine, Inc. v. Triple A Machine Shop*, 720 F. Supp.
21 805, 808 (N.D. Cal. 1989). In particular, the “unlawful” practices forbidden by the statute include
22 “any practices forbidden by law, be it civil or criminal, federal, state or municipal, statutory,
23 regulatory, or court made.” *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994).
24 Here, each of Pacific’s likely violations of the Telco Act and the Sherman Act described above thus
25 is an independent basis entitling Covad to relief under Section 17200. In addition, the Court finds
26 that Pacific’s conduct also satisfies the “unfair” practice prong of Section 17200, which makes
27 unlawful any practice “whose harm to the victim outweighs its benefits.” *Day*, 63 Cal. App. 4th at
28 332 (citation omitted).

1 **B. The Balance of Hardships Favors Covad**

2 Covad's application also requires the Court to examine the potential harm to
3 Covad if that relief is not granted, as well as the impact on the general public and Pacific if an
4 injunction issues. (An injunction under California Business & Professions Code Section 17200,
5 however, does not require any showing of injury to Covad. *Saunders*, 27 Cal. App. 4th at 839.
6 Indeed, the statute essentially "imposes strict liability" and it is not even necessary to show that
7 the defendant intended to injure anyone. *State Farm Fire & Casualty Co. v. Superior Court*, 45
8 Cal. App. 4th 1093, 1102 (1996).)

9 **1. Covad is threatened with irreparable harm**

10 Covad has convincingly shown that it is threatened with irreparable harm absent
11 an injunction. Most fundamentally, Covad is faced with the prospect of Pacific continuing to
12 exclude Covad from geographic markets where, in the absence of Pacific's refusals and delaying
13 tactics, Covad's DSL service would already be operational, while at the same time Pacific
14 introduces its own DSL service in those same markets. Such delays in time to market constitute
15 irreparable injury. *See, e.g., City of Austin*, 975 F. Supp. at 942 (finding irreparable harm from
16 "delayed entry into [local telephone] market" because monetary damages would be speculative
17 and inadequate remedy); *Intergraph Corp. v. Intel Corp.*, 1998 U.S. Dist. 1998-1 Trade Cas.
18 (CCH) ¶ 72,126 LEXIS 4820, *39 (N.D. Ala., April 10, 1998) (injunction granted; court found a
19 conceded 30-90 delay in plaintiff's time to market "would prevent [plaintiff] from maintaining a
20 competitive presence in the high-end workstation market."); *see also United States v. AT&T*, 524
21 F. Supp. at 1356 (refusing to dismiss antitrust claim based on manipulation of timing of new
22 product deployment so as to discourage new entry by competitors).

23 In addition, Pacific's delays and deliveries of unserviceable collocation, loops and
24 transport, and its threats to impose unilateral technological changes on Covad all cause or
25 threaten to cause harm to Covad's goodwill, customer relations and general reputation. *See*
26 *Intergraph*, 1998 U.S. Dist. LEXIS, at *57 (finding that interruption in supply would cause
27 irreparable harm to plaintiff "in terms of loss of good will, harm to reputation, and other losses").
28

1 **2. The proposed injunction is in the public interest**

2 The Court also finds that the proposed injunction is in the best interest of the
3 general public. Hastening competitors' entry into developing markets is plainly in the public
4 interest. *See United States v. AT&T*, 552 F. Supp. 131, 150 n.80 (D.D.C. 1982), *aff'd sub nom.*,
5 460 U.S. 1001 (1983) ("restraints may be imposed upon the defendant which are designed to
6 allow the development of nascent competition within the relevant market") (citing *Ford Motor*
7 *Co. v. United States*, 405 U.S. 562, 575 (1972)); *City of Austin*, 975 F. Supp. at 942 (enjoining as
8 against public interest ordinance that would have delayed competitors' entry into local telephone
9 market).

10 **3. The requested injunction will not materially harm**
11 **Pacific**

12 The Court also finds that the injunction will not impose any significant harm on
13 Pacific. Much of the injunction merely compels Pacific to comply with its existing obligations
14 under the law. The remaining feature of the relief -- access to the market at the same time as
15 Pacific -- is if anything generous to Pacific, given that Covad attempted to enter the market long
16 before Pacific tried to do so.

17 **INJUNCTION**

18 For the foregoing reasons, IT IS HEREBY ORDERED THAT Covad's motion
19 for a preliminary injunction is GRANTED. IT IS FURTHER ORDERED THAT Pacific, its
20 agents, servants and employees, and all persons acting under, in concert with, or for them
21 (collectively, "Pacific") are hereby restrained and enjoined as follows:

22 1. For each Central Office in which Pacific plans to deploy xDSL service and
23 in which it has denied a Covad request for collocation, Pacific shall make available to Covad the
24 necessary collocation space and other unbundled network elements to allow Covad to begin
25 offering its xDSL service in the same Central Office, no later than the same date on which
26 Pacific first offers xDSL service from that Central Office, or not later than 15 days after the entry
27 of this injunction, whichever is sooner.

1 2. Pacific shall not discriminate against Covad in the provision of collocation
2 space, local loops, and transport facilities in any manner whatsoever. This prohibition includes
3 without limitation,

4 a. delaying the construction of collocation cages beyond the dates
5 promised in Pacific's agreements with Covad;

6 b. delaying Covad's ability to pre-order transport facilities until after
7 collocation cages are completed;

8 c. delaying or disrupting Covad's service by improper or untimely
9 provisioning of local loops or transport.

10 3. Pacific shall not require Covad to replace any customer premises
11 equipment or equipment collocated in any Pacific Central Office on the grounds that Covad's
12 equipment does not conform to Pacific's desired xDSL standards. Pacific shall not disable any
13 xDSL line being operated by Covad on the grounds of spectral interference, without first giving
14 notice to Covad and obtaining leave to do so from this Court.

15 4. Pacific shall not deny any request by Covad for collocation without first
16 either (1) proving to the California Public Utilities Commission that space is unavailable in the
17 Central Office in which collocation is requested, or (2) obtaining leave of this Court.

18 DATED: _____, 1998.

19
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21 By: _____
22 UNITED STATES DISTRICT JUDGE
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28

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 COVAD COMMUNICATIONS
15 COMPANY, a California corporation,

16 Plaintiff,

17 v.

18 PACIFIC BELL, a California corporation,
19

20 Defendant.
21

No. C 98-1887 SI

PROOF OF SERVICE

22
23 I am over 18 years of age, not a party to this action and employed in San
24 Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am
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PROOF OF SERVICE (Case No. 98-1887 SI)

1 **NOTICE AND APPLICATION FOR PRELIMINARY**
2 **INJUNCTION; MEMORANDUM OF POINTS AND**
3 **AUTHORITIES IN SUPPORT**

4 **DECLARATION OF NORA CREGAN IN SUPPORT OF**
5 **COVAD COMMUNICATIONS COMPANY'S**
6 **APPLICATION FOR PRELIMINARY INJUNCTION**

7 **DECLARATION OF MARGE DONALDSON IN SUPPORT**
8 **OF PLAINTIFF'S MOTION FOR PRELIMINARY**
9 **INJUNCTION**

10 **DECLARATION OF MICHAEL GABRYS IN SUPPORT OF**
11 **COVAD COMMUNICATIONS COMPANY'S**
12 **APPLICATION FOR PRELIMINARY INJUNCTION**

13 **DECLARATION OF CHARLES J. HAAS IN SUPPORT OF**
14 **COVAD COMMUNICATIONS COMPANY'S**
15 **APPLICATION FOR PRELIMINARY INJUNCTION**

16 **DECLARATION OF CARL MILLER IN SUPPORT OF**
17 **COVAD COMMUNICATIONS COMPANY'S**
18 **APPLICATION FOR PRELIMINARY INJUNCTION**

19 **DECLARATION OF LOU PELOSI IN SUPPORT OF**
20 **COVAD COMMUNICATIONS COMPANY'S**
21 **APPLICATION FOR PRELIMINARY INJUNCTION**

22 **DECLARATION OF THOMAS REGAN IN SUPPORT OF**
23 **PLAINTIFF'S MOTION FOR PRELIMINARY**
24 **INJUNCTION**

25 **DECLARATION OF JOHN RUGO IN SUPPORT OF**
26 **PLAINTIFF'S MOTION FOR PRELIMINARY**
27 **INJUNCTION**

28 **DECLARATION OF DAVID SHARNOFF IN SUPPORT OF**
29 **COVAD COMMUNICATIONS COMPANY'S**
30 **APPLICATION FOR PRELIMINARY INJUNCTION**

31 **SUMMARY OF ARGUMENT IN SUPPORT OF**
32 **APPLICATION FOR PRELIMINARY INJUNCTION**

33 **[PROPOSED] ORDER GRANTING PRELIMINARY**
34 **INJUNCTION**

35 **EX PARTE MOTION FOR ORDER SHORTENING TIME**
36 **FOR HEARING ON COVAD COMMUNICATIONS**
37 **COMPANY'S APPLICATION FOR PRELIMINARY**
38 **INJUNCTION**